Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CITY OF SACRAMENTO and THOMAS SHRUM,
Petitioners,

v.

STEVEN YOUNT,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is there an "unjustified and excessive response" exception to the application of this Court's rule in *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars 42 U.S.C. section 1983 excessive force claims that collaterally attack prior criminal convictions?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Sacramento and Thomas Shrum respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered on May 19, 2008.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 43 Cal.4th 885, 76 Cal.Rptr.3d 787, 183 P.3d 471 (2008), and is reprinted in the Appendix hereto (App. 2-30).

The opinion of the Court of Appeal of California, Third Appellate District, was originally reported at 133 Cal.App.4th 1424, 35 Cal.Rptr.3d 563, as modified by 2005 Cal.App.LEXIS 1895 (2005), and is reprinted in the Appendix hereto (App. 31-63).

The judgment of the Superior Court of California in and for the County of Sacramento is unreported, and is reprinted in the Appendix hereto (App. 64-65).

JURISDICTION

The California Supreme Court filed its decision on May 19, 2008. A timely petition for rehearing was denied on July 16, 2008 (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSITITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution provides, in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

The text of 42 U.S.C. § 1983 and pertinent portion of California Penal Code section 148 are set out in the Appendix (App. 66-67), pursuant to Supreme Court Rule 14.1(f).

STATEMENT

Petitioner Thomas Shrum is a police officer employed by Petitioner City of Sacramento. Officer Shrum, in an attempt to subdue a struggling Mr. Yount by the application of a Taser, mistakenly drew and fired his pistol. Thankfully, Mr. Yount was only wounded by the shot.

A. Background of the Action

On March 10, 2001, at approximately 3:15 a.m., Officer Sam Davis of the Sacramento Police Department was on patrol in a marked police. Immediately after Officer Davis entered a strip mall parking lot a private security guard directed him to a drunk Steven Yount, who was attempting to drive away after unsuccessfully trying to purchase beer. Officer Davis pulled in behind Yount, to stop Yount from backing out of a parking space.

Officer Davis approached Yount to speak with him. Yount's eyes were glassy and red, he smelled of alcohol, and he was unsteady on his feet. Officer

Davis escorted Yount to the back seat of the police car. While in the back seat of the police car, Yount started to protest: he repeatedly banged his head against the interior of the police car; he kicked; he yelled and screamed; he yelled racial epithets and other expletives at Officer Davis.

Officer Davis verbally requested Yount to stop the belligerent conduct. After Yount responded with crude cussing, Officer Davis pulled Yount from the car and, with the assistance of two security guards, handcuffed him. Yount continued to bang his head, kick, and make noise once he was put back into the police car, which raised further concern in Officer Davis for Yount's safety.

Sacramento Police Department Officers Shrum and Swafford, and Sacramento State University Police Officer Hatfield then arrived on the scene. Officer Davis asked Officers Shrum and Swafford to assist him with DUI paperwork. Officer Hatfield did work related to the tow of Yount's car.

Yount continued to scream, kick, and bang his head inside the police car. Officer Shrum tried to reason with Yount. When Officer Shrum opened the door, however, Yount kicked him a couple times. Officer Swafford went to the other side of the police car and used his Taser on Yount. That calmed Yount momentarily, and the officers returned to doing their paperwork.

Because Yount continued to scream, kick, and bang his head, Officer Davis went toward the back of the car to speak with Yount. Yount did not cooperate; instead, he kicked out the police car

window with such force that flying glass hit Officer Davis in the face and body.

Recognizing that Officer Davis' car was no longer secure, and fearing that Yount may injure himself and do further damage to the police car, the officers decided to remove Yount from the car and apply hobbles. However, when Officer Davis attempted to remove him, Yount wedged himself in the car. When Officer Davis ultimately succeeded in pulling him out, Yount landed on top of Officer Davis, who injured his elbow when he hit the ground. Yount spit at Officer Davis and Officer Davis received a kick near the groin.

While on the ground, Yount continued to struggle. He yelled and cussed. He lurched and tried to bite officers. He struggled and tried to get up. He convulsed his body and kicked out his legs. The officers tried to control Yount and then carry him to another police car. Unfortunately, they could not completely hobble him and could not get him under control. As the officers tried to carry him, Yount continued to scream, squirm, spit, jerk, and kick his legs back and forth. The officers could not control or carry Yount because of his struggling.

Officer Shrum decided Yount posed a threat of injury to the officers or Yount himself, and therefore Yount needed to be "tased." Officer Shrum had prior Taser training; the use of a Taser under the circumstances as Officer Shrum understood them, i.e., a combative person, was consistent with the Sacramento Police Department's General Orders. Officer Shrum reached for his Taser, which was holstered on the right side of his body, anticipating

that he would touch-stun Yount. Unfortunately, Yount's legs thrust Officer Shrum back and forth as Officer Shrum reached for his Taser. Officer Shrum thus mistakenly grabbed his pistol and fired one round into Yount's buttock.

There was uncontroverted testimony from Officer Shrum, both on direct examination and cross-examination, that he intended to use his Taser, not his pistol.

Yount himself has no recollection of the foregoing events; his blood-alcohol level following his arrest was determined to be 0.296 percent.

B. Yount's Criminal Conviction

Yount was convicted of drunk driving and resisting arrest for the events of March 10, 2001. More specifically, after waiving his right to a preliminary hearing, Yount pled no contest[1] to violating California Penal Code section 148 – resisting, delaying or obstructing a peace officer in the performance of his/her duties – as a result of his unlawful conduct toward Officer Shrum and the other three officers. Yount stipulated to a factual basis for his resisting arrest charge, and the criminal court found a factual basis for Yount's plea.

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[1] The no contest plea is, for purposes of the issues presented in this case, equal to a guilty plea or jury verdict of guilty. *Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1135 (C.D. Cal. 1999).

C. Civil Proceedings in the State Courts

Yount sued the City of Sacramento and Officer Shrum for damages. In his operative pleading, he asserted three state law claims and he asserted a federal civil rights claim (42 U.S.C. § 1983) against Officer Shrum alone. The cause of action under section 1983 alleged in particular that Yount was handcuffed and restrained and posed no threat of violence to any person at the time he was shot, that he likewise was not attempting to interfere with any officer, and that he did nothing that provided any legal justification or excuse for Officer Shrum's conduct.

The City and Officer Shrum answered, including an allegation that success in the civil action would necessarily imply the invalidity of Yount's criminal conviction, and was thus barred pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994)("*Heck*"). When the case reached trial the parties agreed to bifurcate the *Heck* issue and try it before the court, without a jury. By that point, Yount had elected to proceed on only two causes of action: his Section 1983 claim and his claim for common law battery.

During the *Heck* hearing, the trial court heard from seven eyewitnesses and took judicial notice of the file of the criminal proceeding. Based upon that evidence, the court concluded that a finding of excessive force would be a collateral attack on Yount's misdemeanor conviction for resisting the officers, since the conviction itself established that Officer Shrum had acted appropriately. The trial court found that Yount's own actions, which formed

the basis of his criminal conviction, led to Officer Shrum's use of force; that Yount's conviction encompassed resistance to all four officers; and that, despite brief pauses in Yount's resistance, the entire episode was one continuous transaction. For those reasons, the trial court held that Yount's civil claims were barred by *Heck*.

The Court of Appeal reversed. That court reasoned that, in general, "if the evidence discloses at least one violation of section 148 independent of and discrete from the officer's alleged misconduct, *Heck* does not apply," inasmuch as that remaining act could be used to sustain the conviction (App. 56). The court concluded that Yount's claims for damages did not impugn his conviction for resisting the officers because, even if Yount prevailed in his civil suit, his criminal conviction could be sustained by any one of Yount's other acts of resistance that was unrelated to the shooting.

The California Supreme Court affirmed in part and reversed in part. The court explained that Yount's conviction established his culpability during the entire episode with the four officers, and that *Heck* and its progeny thus barred any civil rights claim that is inconsistent with even a portion of that conviction. (App. 17.) However, while the court concluded that Yount's criminal conviction was an admission that he was resisting the officers up until the time he was shot, it nonetheless held that "to the extent Yount's section 1983 claim alleges simply that Officer Shrum's use of *deadly* force was an unjustified and excessive response to Yount's resistance, the claim is not barred" by the rule set forth by this Court in *Heck*. (App. 20-21.)

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS WARRANTED BECAUSE THE CALIFORNIA SUPREME COURT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *HECK v. HUMPHREY* BY ALLOWING A CRIMINAL DEFENDANT TO COLLATERALLY ATTACK A CONVICTION IF THE FORCE USED BY OFFICERS IS "UNJUSTIFIED AND EXCESSIVE."

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that a state prisoner's action for damages under 42 U.S.C. § 1983 arising from his purportedly unconstitutional conviction in state court was barred because it had not been reversed, expunged, or otherwise called into question directly. After expressing its concern for finality and consistency, its disinclination to expanding opportunties for collateral attack on criminal convictions, and its recognition of "the hoary principle that civil court actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" (*id.* at 485-486), the Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,[footnote] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct

> appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate[1] that the conviction has already been invalidated. 512 U.S. at 487.

The footnote within the Court's holding sets forth an example of *Heck's* practical application:

> An example of this latter category – a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful – would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a lawful arrest. (This is a common definition of that offense. . . .) He then

> brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, see n. 2, supra, the § 1983 action will not lie. 512 U.S. at 487, fn.6.

In everyday practice, the Court's holding (and that footnote in particular) has become known as the "*Heck* bar." In simple terms, courts have interpreted *Heck* to say that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996).

In this case, the California Supreme Court has created from whole cloth an "unjustified and excessive response" exception to the *Heck* bar. The California Supreme Court's unique application of *Heck* is flatly inconsistent with this Court's decision in *Heck* and sharply undermines the effective application of *Heck*.

Heck should bar Yount's action for excessive force against Officer Shrum because it was undisputed that under California law, lawful use of force by a police officer is a prerequisite to a conviction for interfering with a police officer under California Penal Code section 148 (*Susag v. City of*

Lake Forest, 94 Cal. App. 4th 1401, 1409, 115 Cal. Rptr. 2d 269, 273 (2002)), and Yount voluntarily pled no contest to violation of California Penal Code section 148 in state court.

A. The California Supreme Court's Decision Conflicts with this Court's Decision in *Heck* by Creating an "Unjustified and Excessive Response" Exception to the *Heck* Bar.

To prevail on a Section 1983, a plaintiff must prove the defendant, acting under the color of state law, deprived the plaintiff of a statutory or constitutional right. 42 U.S.C. § 1983.

All Section 1983 claims alleging constitutional violations concerning the use of force must be analyzed under the Fourth Amendment. *Graham v. Connor* (1989) 490 U.S. 386, 395. That is, all claims that law enforcement officers used excessive force, whether deadly or not, in the course of an arrest, are analyzed under the "reasonableness" standard of the Fourth Amendment. *Id.*

Thus, Yount's section 1983 claim, by its very nature, asserts that Officer Shrum's actions were "unjustified and excessive," because *all* section 1983 use of force claims are necessarily based upon allegations of unreasonable (i.e., unjustified) or excessive force.

But the *Heck* bar prevents any such claim from proceeding if it collaterally attacks the underlying criminal conviction. *Heck* provides that a

plaintiff may not maintain a section 1983 claim if it calls into question the lawfulness of the plaintiff's prior criminal conviction. 512 U.S. at 485. More specifically, if the plaintiff's section 1983 claim requires that he negate an element of the offense of which he has been convicted – e.g., the lawfulness of an officer's conduct – he is barred from bringing that Section 1983 claim. *Id.* at 486-487, fn. 6.

Application of the *Heck* doctrine has two predicate factors: (1) an extant criminal conviction that established the "lawfulness" of the involved officer's conduct; and (2) the assertion of a section 1983 claim predicated upon the same operative facts giving rise to the criminal conviction. By matching the two predicates, there results a legal conclusion that the section 1983 claim is either barred or it is not.

For liability under Section 1983, the use of excessive force need be just that – "excessive." The plaintiff need not establish, and the jury need not specifically find, that the force creating liability is "somewhat excessive," "very excessive," or "clearly excessive." Any amount of "unreasonableness" or "excessiveness" is enough. Once that minimum threshold is reached, the consequences of the level of force are simply reflected in the awarded special and general damages.

So, the *Heck* bar must be applied without reference to the actual force used. Nothing in *Heck* supports the insertion of a "level of force" or "egregiousness" calculus. The *Heck* bar derives solely from the criminal conviction and the subsequent civil action founded upon the same

incident at issue in the criminal case. While perhaps helpful to a determination of damages, the location of the applied force along the force continuum is irrelevant to *Heck's* application.

Defendants respectfully submit that the California court, in its May 19, 2008, decision, conflated the foregoing analysis with the concept that a peace officer may use only use "reasonable" force to effect an arrest (App. 19-20), and thus an "excessive" response is not barred.

The fundamental flaw in that conclusion is that it completely, if indirectly, eliminates the *Heck* bar. The reason is simple: all Section 1983 claims based upon use of force are necessarily alleging excessive force; if there is no excessive force, there is no claim. And *Heck* is applicable to section 1983 claims; therefore, it applies to excessive force claims. If the California court's conclusion is left standing, it will stand as a illogical barrier to the practical application of *Heck*.

Petitioners emphasize here that not all plaintiffs are barred by *Heck* when "unjustified and excessive" force is used during an arrest. But, for the sound policy reasons discussed in *Heck*, those plaintiffs that have had their opportunity to challenge the lawfulness of an officer's conduct in the criminal courts cannot later assert section 1983 claims – whatever the alleged level of force used by the officer. That is where the California court deviated from this Court's rule: it put the theoretical necessity for a remedy above the sober application of this Court's decision in *Heck*.

B. The California Supreme Court's Decision Contradicts this Court's Decision in *Heck*, Because it Allows Collateral Attacks on Criminal Convictions by Plaintiffs Who Have Availed Themselves of Double Jeopardy Clause Protections.

The California court begins it discussion by summarizing this Court's *Heck* decision, as applied to section 1983 claims for damages. (App. 11-13.) Then the court stated how the "trial court did not rely solely on the bare record of the criminal proceeding in analyzing the scope of Yount's criminal conviction, but considered also the testimony of the seven eyewitnesses who testified at the bifurcated *Heck* hearing." (App. 15.) And it found that the trial court's "implied finding that Yount's conviction included his resistance up until the time he was shot was amply supported by substantial evidence." (App. 15-16.)

The court next rejected Yount's argument that the *Heck* bar is inapplicable when the plaintiff seeks to undermine only part of his criminal conviction. "As the trial court found, Yount's conviction established his culpability during the entire episode with the four officers, and any civil rights claim that is inconsistent with even a portion of that conviction is barred because it would necessarily imply the invalidity of that part of the conviction." (App. 15-17.)

Finally, the court agreed that the Double Jeopardy Clause protects Yount against any further

prosecution for resisting the four officers. "It would be anomalous to construe Yount's criminal conviction broadly for criminal law purposes so as to shield him from a new prosecution arising from these events but then, once he had obtained the benefits of his no contest plea, to turn around and construe the criminal conviction narrowly so as to permit him to prosecute a section 1983 claim arising out of the same transaction." (App. 19.)

Following that rationale, then, it must simply be asked: does the plaintiff – who shielded himself from further criminal prosecution – allege a claim "arising out of the same transaction?" If so, then "any civil rights claim that is inconsistent with even a portion of [his] conviction is barred because it would necessarily imply the invalidity of that part of the conviction." And here, the court expressly stated that "Yount's conviction established his culpability during the entire episode with the four officers." As the "entire episode with [all] four officers" was encompassed in his plea deal, his claim "aris[es] out of the same transaction;" thus, his civil rights claim necessarily implies the validity of the conviction.

Despite the above reasoning, the court then parsed out Officer Shrum's alleged misconduct for special consideration. That, however, runs contrary to the recognition that Yount received Double Jeopardy Clause Protection for all of his actions.

In sum, the California Supreme Court improvidently limited the *Heck* rule established by this Court. Its created exception swallows the rule of *Heck's* applicability. It thus confounds the scope,

purpose, and rationale of this Court's decision in *Heck*, and the burdens that attend the benefits received by a pleading criminal defendant under the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, a petition for writ of certiorari should be granted.

Respectfully Submitted,

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Court of Appeal, Third Appellate District - No. C046869
S139762

IN THE SUPREME COURT OF CALIFORNIA

En Banc

STEVEN YOUNT, Plaintiff and Appellant,

v.

CITY OF SACRAMENTO et al., Defendants and Respondents.

The petition for rehearing is denied.

SUPREME COURT
FILED

July 16, 2008

Frederick K. Ohlrich Clerk

Deputy

/s/ GEORGE

Chief Justice

Filed 5/19/08

IN THE SUPREME COURT OF CALIFORNIA

STEVEN YOUNT,	)
	)
Plaintiff and Appellant,	)
	) S139762
v.	)
	) Ct.App.3
CITY OF SACRAMENTO et al.,	) C046869
	) Sacramento
Defendants and Respondents.	) County
	) Super. Ct.
	) No. 1AS04272

Plaintiff Steven Yount suffered injuries when Sacramento Police Officer Thomas Shrum shot him in the left buttock as Shrum and three other officers were trying to transport him to jail following his arrest for driving under the influence of alcohol (DUI). Just prior to the shooting, Yount, despite being in handcuffs and leg restraints, was struggling and threatening the officers. Officer Shrum, intending to draw and fire his Taser gun in order to subdue Yount, mistakenly pulled out and discharged his pistol instead.

As a result of this incident, Yount pleaded no contest to violating Penal Code section 148, subdivision (a)(1) (resisting, delaying, or obstructing an officer in the performance of the officer's duties). He then brought this action against the City of Sacramento and Officer Shrum for damages arising from the violation of his civil rights under title 42

United States Code section 1983 (section 1983) and asserted a common law claim of battery as well.

Defendants argued that the section 1983 claim must be dismissed as an improper collateral attack on Yount's criminal conviction under *Heck v. Humphrey* (1994) 512 U.S. 477 (*Heck*), which bars a plaintiff from prosecuting a section 1983 action that necessarily implies the invalidity of his or her criminal conviction or sentence until that conviction or sentence has first been invalidated, and that the battery claim must be dismissed under analogous state authority (see *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1410-1413). By stipulation of the parties, a bifurcated court hearing was had on the issue of whether Yount's civil claims were barred under *Heck* and *Susag* by his criminal conviction. The trial court, after hearing from seven eyewitnesses, ruled that the claims were barred and entered judgment for defendants. The Court of Appeal reversed, finding the possibility that Officer Shrum's alleged use of excessive force may have been temporally distinct from the acts that formed the basis of Yount's no contest plea to resisting the officers sufficient to avoid the *Heck* bar. In so doing, the Court of Appeal disagreed with *Susag*, which had, on somewhat similar facts, viewed the plaintiff's criminal conviction as encompassing all of the acts of resistance supported by the evidence.

We granted review to resolve the conflict. For the reasons set forth below, we find that Yount's claims are barred to the extent they allege that Officer Shrum was not entitled to use force *at all* in this incident. Yount's resistance justified the officers' use of reasonable force in response. (Pen. Code, §

835a.) However, as defendants concede, the use of *deadly* force was not reasonable in this instance. Yount's conviction for violating Penal Code section 148, subdivision (a)(1) did not in itself justify the use of deadly force, either. Accordingly, Yount's civil claims are not barred to the extent they challenge Officer Shrum's use of deadly force. We therefore affirm in part and reverse in part the judgment of the Court of Appeal.

BACKGROUND

When plaintiff Steven Yount left his home in the early morning hours of March 10, 2001, he was very drunk. He had consumed more than a six-pack of beer and an unknown amount of rum. He drove out in search of more beer, but had no recollection of arriving at the 7-Eleven store on La Riviera Drive in East Sacramento, no recollection of being told that he could not purchase beer after 2:00 a.m., no recollection of staggering and swaying out of the store and getting back into his car, and no recollection of his struggle with the police attempting to effect his arrest that resulted in his being shot, accidentally, in the left buttock.

Daniel Powell, a private security guard, saw Yount in the parking lot of the 7-Eleven prior to the shooting. Yount was visibly drunk and heading towards his car, so Powell placed a call to the police. Around that same time, Officer Samuel Davis of the Sacramento Police Department drove into the parking lot. Powell directed Officer Davis to Yount's car, which was starting to back out, and warned him that Yount was drunk. Officer Davis pulled his

patrol vehicle behind Yount's car to block its exit and got out of his car to talk to Yount.

Yount's eyes were glassy and red. When asked whether he had ever been arrested before for driving under the influence, Yount responded, "Which date?" Officer Davis asked Yount to step out of the car. Yount did so but lost his balance and "kind of fell into" the officer. Yount came willingly part of the way to the patrol vehicle, but then became apprehensive and refused to get inside. Officer Davis was eventually able to maneuver him into the back seat. As Officer Davis continued his investigation, Yount yelled, "[Y]ou can't do anything with me. You are not going to take me to jail, nigger," and shouted other obscenities and racial slurs. Yount also banged his head and kicked against the side and window of the patrol vehicle. Concerned that Yount was going to injure himself, Officer Davis asked him to stop. Yount replied, "Fuck you."

With the assistance of two private security guards at the scene, Officer Davis managed to pull Yount out of the patrol vehicle and handcuff him. The three of them then placed Yount, whose resistance was undiminished, back in the patrol vehicle. As Officer Davis tried again to resume his investigation, Yount continued to bang his head and feet against the doors and to make as much noise as he could, further indicating that he was at risk of hurting himself.

When Officer Debra Hatfield of the California State University Police Department, Sacramento, and Officers Daniel Swafford and Thomas Shrum of the Sacramento Police Department arrived to assist

minutes later, Officer Davis explained that he needed their help in completing the written DUI report, as he was supposed to be taking over as acting sergeant for the entire downtown area. As part of that assistance, Officer Shrum opened the door to ask Yount for identification, but Yount "just popped out" of the vehicle and tried to "move right in [Shrum's] face" and continued yelling and cursing. Officer Shrum retrieved Yount's wallet himself and had to force Yount back into the patrol vehicle.

Unfortunately, once back in the patrol vehicle, Yount resumed banging and shaking it, as well as yelling and cursing. Officers Hatfield, Swafford, and Shrum attempted to calm him down, to no avail. They warned him they would use a Taser if he did not cooperate, but Yount taunted them, "Shoot me, shoot me, shoot me" and kicked his legs at Officer Shrum. Officer Swafford went to the other side of the vehicle and Tasered Yount in the back, which caused him to interrupt his resistance for a few minutes, but Yount then became more violent. He called Officer Davis a "nigger" and Officer Hatfield a "whore" and expressed his hope that they all would die that night. He also started kicking at the car window with both feet. Officer Shrum saw the window start to flex and, as Officer Davis started walking towards it, "the thing just explode[d] in his face."

Because of Yount's resistance, Officer Davis decided that Yount's legs needed to be immobilized before they could transfer him to another patrol vehicle. Yount, however, continued to be uncooperative and fought to stay in the car. The officers eventually succeeded in pulling Yount out of

the damaged vehicle, but the effort caused Officer Davis to stumble backwards and hit his elbow on the ground. Yount fell on top of Officer Davis, kicked Officer Davis close to his groin, and spat on him. Officer Davis then got on top of Yount, who continued to struggle and shout, and placed his knee on Yount's upper back to keep him on the ground. Officer Hatfield grabbed his left leg; Officer Shrum grabbed his right. The officers succeeded in securing Yount's ankles together, but they were not able to connect the ankle restraint to his wrists.

Despite the restraints on his wrists and ankles, Yount still continued to resist. He tried to bite and spit at the officers near his head. He tucked his body in to kick more forcefully at the officers near his feet. Officer Shrum was having trouble holding onto Yount's knees and, believing Yount posed a risk of injury to himself and the other officers, decided to use his Taser. Officer Shrum pulled what he thought was his Taser and fired it at the back of Yount's upper thigh. It was only then that he looked down at the weapon in his hand and saw he had mistakenly grabbed his pistol. Once the officers ascertained that Yount had indeed suffered a gunshot wound, they called for medical assistance.

Two independent eyewitnesses, Daniel Powell and Robert Corke, confirmed that Yount had been resisting the officers up until the time he was shot. There is no evidence in the record that Yount committed any act of resistance after he was shot.

Yount's blood-alcohol level following his arrest was determined to be 0.296 percent.

Criminal Proceedings

An amended criminal complaint charged Yount with violently resisting all four officers in the performance of their duties (Pen. Code, § 69; count 1) as well as battery of a peace officer (*id.*, § 243, subd. (c)(2); count 2) and two counts of driving under the influence (Veh. Code, §§ 23152, subds. (a), (b); counts 3 and 4). On June 19, 2001, after Yount waived his right to a preliminary hearing, he pleaded no contest to DUI with three prior DUI convictions (Veh. Code, §§ 23550, 23626) and to the related misdemeanor offense of violating Penal Code section 148, subdivision (a)(1) (resisting an officer). The remaining counts were dismissed. Yount stipulated to the facts in count 1, and the court found a factual basis for the plea as to each count. Yount was placed on probation for five years and ordered to serve 270 days in county jail and pay specified fines.

Civil Proceedings

On October 28, 2002, Yount filed a first amended complaint against Officer Shrum and the City of Sacramento for damages, alleging assault and battery and intentional infliction of emotional distress. The complaint also alleged violation of his rights under the Unruh Act (Civ. Code, §§ 51 et seq.) and violation of his civil rights (42 U.S.C. § 1983) against Officer Shrum alone.

The complaint asserted that Officer Shrum without probable cause wrongfully, negligently, intentionally, and with deliberate indifference to Yount's constitutional rights assaulted and battered Yount by shooting him in the buttock without any

justification; that Yount had been arrested, handcuffed, and hobbled at the time and was not then attempting to interfere with the officers; that Yount at no time posed any reasonable threat of violence to Officer Shrum or did anything to justify the force used against him; and that the force used against him was excessive, unnecessary, and unlawful. The cause of action under section 1983 alleged in particular that Yount was handcuffed and restrained and posed no threat of violence to any person at the time he was shot, that he likewise was not attempting to interfere with any officer, and that he did nothing that provided any legal justification or excuse for Officer Shrum's conduct.

Defendants' answer included an allegation that success in the civil action would necessarily imply the invalidity of Yount's criminal conviction for violating Penal Code section 148, subdivision (a)(1). (See *Heck*, *supra*, 512 U.S. 477.) The parties agreed to bifurcate the *Heck* issue and try it before the court, without a jury. By that point, Yount had elected to proceed on only two causes of action: his civil rights claim under section 1983 and his claim for common law battery.

During the *Heck* hearing, the trial court heard from seven eyewitnesses and took judicial notice of the file of the criminal proceeding. Following the hearing, the court concluded that a finding of excessive force would be a collateral attack on Yount's misdemeanor conviction for resisting the officers, since the conviction itself established that Officer Shrum had acted appropriately. The trial court found that Yount's own actions, which formed the basis of his criminal conviction, led to Officer

Shrum's use of force; that Yount's conviction encompassed resistance to all four officers; and that, despite brief pauses in Yount's resistance, the entire episode was one continuous transaction. For those reasons, the trial court held that Yount's civil claims were barred by *Heck*.

The Court of Appeal reversed in a published opinion. The Court of Appeal reasoned that, in general, "if the evidence discloses at least one violation of section 148 independent of and discrete from the officer's alleged misconduct, *Heck* does not apply," inasmuch as that remaining act could be used to sustain the conviction. The court concluded that Yount's claims for damages did not impugn his conviction for resisting the officers because, even if Yount prevailed in his civil suit, his criminal conviction could be sustained by any one of Yount's other acts of resistance that was unrelated to the shooting.

DISCUSSION

Section 1983, as relevant here, provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

The legal proposition at issue here is easily stated but somewhat less easy to apply. It is this: "a

state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." (*Edwards v.Balisok* (1997) 520 U.S. 641, 643, quoting *Heck*, *supra*, 512 U.S. at p. 487.) The parties agree that Yount's conviction for resisting the officer in violation of Penal Code section 148, subdivision (a)(1) remains intact. We must therefore decide whether success on Yount's section 1983 claim would necessarily imply the invalidity of that criminal conviction.

A

Our discussion begins with *Heck*, *supra*, 512 U.S. 477, which first established that a section 1983 claim calling into question the lawfulness of the plaintiff's conviction or confinement is not cognizable until the conviction or confinement has been invalidated. (*Heck*, *supra*, at p. 483.) *Heck* analogized a section 1983 claim in such circumstances to the common law cause of action for malicious prosecution, which similarly includes the termination of the prior criminal proceeding in favor of the accused as an element of the cause of action. "This requirement 'avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.' [Citation.] Furthermore, 'to permit a convicted criminal defendant to proceed with a malicious prosecution

claim would permit a collateral attack on the conviction through the vehicle of a civil suit.' [Citation.] This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack [citations]. We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." (*Heck, supra,* 512 U.S. at pp. 484-486, fns. omitted.) Thus, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus [citation]." (*Id.* at pp. 486-487, fn. omitted.)

One example provided by the high court is especially pertinent to the circumstances here: "A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. . . . He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted." (*Heck,*

supra, 512 U.S. at pp. 486-487, fn. 6.) Although (as the Court of Appeal correctly pointed out) Penal Code section 148, subdivision (a)(1) is unlike the law of many states in that it is not limited to a defendant's conduct in resisting arrest but extends to a defendant's resistance of an officer in the discharge or attempted discharge of *any* duty of his or her office, it similarly requires that the officer be *lawfully* engaged in the performance of his or her duties. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217; but see *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 695-696 (en banc) [mistakenly limiting § 148, subd. (a)(1) to resistance in the course of an arrest].)

To determine "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction" (*Heck*, *supra*, 512 U.S. at p. 487), the Court of Appeal proposed a three-part analysis: "First, the court must determine, using the substantial evidence test, what acts or omissions may have formed the factual basis for the plaintiff's obstruction conviction. Second, the court must ascertain what alleged misconduct by the officer forms the factual basis for the civil rights claim (e.g., excessive force). The final step is to consider the relationship between the plaintiff's acts of obstruction and the officer's alleged misconduct." We find this framework useful (see *VanGilder v. Baker* (7th Cir. 2006) 435 F.3d 689, 691), although we do not agree fully with the Court ofAppeal's application of it in this case.

Yount pleaded no contest to a single count of violating Penal Code section 148, subdivision (a)(1), a misdemeanor. The legal elements of that crime are

as follows: "'(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.' " (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) Yount made a deliberate decision to waive a preliminary hearing and stipulated to a factual basis for the plea without any explicit recitation of what those facts were. (Cf. *In re Gross* (1983) 33 Cal.3d 561, 567-568 [finding no statutory or constitutional requirement that a trial court satisfy itself of the existence of a factual basis for a plea to a misdemeanor].)

Yount's section 1983 claim, in turn, alleges that his Fourth Amendment rights were violated during this same incident because Officer Shrum lacked probable cause to arrest him and because Officer Shrum used excessive force. The section 1983 claim alleges in particular that Officer Shrum assaulted and battered Yount by shooting him in the buttock "without any justification," that Yount was not attempting to interfere with any duties of any police officer at the time he was shot, that Yount at no time posed any reasonable threat of violence to Officer Shrum or did anything else to justify the force used against him, and that the force used was unnecessary, unlawful, grossly excessive, and deadly.

In analyzing the relationship between Yount's criminal conviction and his section 1983 claim, the Court of Appeal focused in particular on the fact that Yount not only interfered with the performance of

the officers' duties at the time he was shot, but he also "committed several independently identifiable prior acts of resistance and obstruction during the encounter," "*any one of which* could have formed the factual basis for his plea." "Had the only act that could have formed the basis for Yount's [Penal Code] section 148 conviction been his resistance to the officers at the time he was shot," the Court of Appeal continued, "his claim would be barred by *Heck*. The uncontradicted evidence shows, however, that Yount violated the statute a number of times before Officer Shrum pulled out his firearm. The criminal court record recites only that Yount admitted there was a 'factual basis' for his plea. That record is silent as to which act or acts formed the factual basis for Yount's admission. Thus, Yount's civil rights claim based on excessive force would not necessarily impugn his criminal plea, and *Heck* is no bar."

To the extent the Court of Appeal believed that *Heck* was inapplicable here merely because Yount had entered a no contest plea without a preliminary hearing and without explicit identification of which of the multiple acts of resistance formed the factual basis for his conviction, it was mistaken. In this case, the trial court did not rely solely on the bare record of the criminal proceeding in analyzing the scope of Yount's criminal conviction, but considered also the testimony of the seven eyewitnesses who testified at the bifurcated *Heck* hearing. (Cf. *Smith v. City of Hemet, supra*, 394 F.3d at p. 698 ["Neither party . . . was able to identify the facts underlying the plea"]; *Sanford v. Motts* (9th Cir. 2001) 258 F.3d 1117, 1119 ["Nothing in the record informs us what the factual basis was for Sanford's plea"].) The trial court's implied finding

that Yount's conviction included his resistance to the officers up until the time he was shot was amply supported by substantial evidence.

Yount then contends that, whatever the scope of his criminal conviction, *Heck* nonetheless "does not apply where the evidence discloses at least one violation of [Penal Code, section] 148 independent of and discrete from an officer's alleged misconduct." In Yount's view (and in the view of the Court of Appeal), *Heck* does not apply *even if* success on the section 1983 claim would be inconsistent with a fact established by his conviction for resisting the officers, so long as there remains, undisturbed by the civil rights action, at least one criminal act sufficient to sustain the criminal conviction. Or, put another way, so long as *one* act of resistance remains undisturbed to support the criminal conviction, it is immaterial that success on the section 1983 claim might be inconsistent with *other* facts that supported the criminal conviction. In Yount's view (and in the view of the Court of Appeal), the fact that the conviction could be sustained on this narrower basis means that a judgment for the plaintiff on the section 1983 claim would not *necessarily* imply the invalidity of the plaintiff's conviction.

We find no support in *Heck* for the notion that the bar preventing collateral attacks on a criminal conviction is inapplicable when the plaintiff seeks to undermine only a *part* of his or her criminal conviction. (Cf. *Heck*, *supra*, 512 U.S. at p. 487 [§ 1983 action should be allowed to proceed only when "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of *any* outstanding criminal judgment against the plaintiff" (second

italics added)].) As the trial court found, Yount's conviction established his culpability during the entire episode with the four officers, and any civil rights claim that is inconsistent with even a portion of that conviction is barred because it would necessarily imply the invalidity of that part of the conviction. (See *Smithart v. Towery* (9th Cir. 1996) 79 F.3d 951, 952 [§ 1983 action must be dismissed when a criminal conviction "arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought"].) Otherwise, a section 1983 plaintiff could routinely circumvent the *Heck* bar through artful pleading—e.g., by filing suit against fewer than all of the potential defendants or by defining the civil cause of action to encompass fewer than all of the criminal acts of resistance (and the police response thereto) involved in the incident. To permit a plaintiff to plead no contest and be found guilty to resisting the officers in the performance of their duties and then to challenge the officers' conduct encompassed by the plea (just as long as the challenge encompassed only a *portion* of the plaintiff's criminal conduct) would promote "'parallel litigation over the issues of probable cause and guilt,' " increase " 'the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution,'" and authorize " 'a collateral attack on the conviction through the vehicle of a civil suit' "—all " 'in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.' " (*Heck, supra*, 512 U.S. at p. 484; accord, *Okoro v. Callaghan* (7th Cir. 2003) 324 F.3d 488, 490 [plaintiff may not avoid the *Heck* bar merely by asserting a "theoretical

possibility" that the criminal conviction and the civil action could coexist].)

The rule proposed by the Court of Appeal and embraced by Yount would also have the perverse effect of rewarding those (like Yount) who engage in multiple acts of resistance with the right to pursue a civil action against the officers, since only those who commit a single act of resistance will find their civil action barred by *Heck*. Under such a scheme, as defendants observe, "the more egregious and more numerous the violations of Penal Code section 148 perpetrated by a criminal defendant, the better that defendant's chances of pursuing a Section 1983 action and avoiding the *Heck* bar." Granting such offenders the right to pursue a civil suit arising out of the same transaction on which their criminal plea is based merely by the expedient of ensuring that the civil action excludes at least one act of resistance (or at least one officer being resisted) is inconsistent with the high court's general reluctance "to expand opportunities for collateral attack." (*Heck*, *supra*, 512 U.S. at p. 485.) Had Yount wanted to maximize his ability to challenge the officers' conduct in a subsequent civil action, *he* could have sought to identify and limit the basis for his plea to violating Penal Code section 148, subdivision (a)(1). (See *Truong v. Orange County Sheriff's Dept.* (2005) 129 Cal.App.4th 1423, 1426.) There was, however, no duty on the part of the court or the prosecution in the criminal proceeding to identify or limit the factual basis for Yount's plea to violating Penal Code section 148, subdivision (a)(1), a misdemeanor. (*In re Gross*, *supra*, 33 Cal.3d at p. 567.)

Indeed, Yount obtained substantial benefit from his general plea. By declining to limit the scope of his no contest plea, Yount is protected against a new prosecution for resisting these officers by the double jeopardy clause. (U.S. Const., 5th Amend.; see *State v. Newman* (1992) 63 Wn.App. 841, 851 [822 P.2d 308, 313].) It would be anomalous to construe Yount's criminal conviction broadly for criminal law purposes so as to shield him from a new prosecution arising from these events but then, once he had obtained the benefits of his no contest plea, to turn around and construe the criminal conviction narrowly so as to permit him to prosecute a section 1983 claim arising out of the same transaction.

We thus conclude that Yount's criminal conviction encompasses his admission that he was resisting the officers up until the time he was shot. The Court of Appeal believed that Yount's civil claim would be barred under such a scenario, but the Court of Appeal was again mistaken, in part.

As stated above, our task is to analyze the relationship between Yount's resistance, as evidenced by his criminal conviction, and Officer Shrum's alleged misconduct, as set forth in the first amended complaint. The record of the *Heck* hearing indicates that Yount was kicking, spitting, and refusing to cooperate with the officers just prior to the shooting. Under those circumstances, Officer Shrum was justified in responding with reasonable force. (Pen. Code, § 835a; *People v. Curtis* (1969) 70 Cal.2d 347, 356-357.) Hence, to the extent that Yount's section 1983 claim alleges that he offered no resistance, that he posed no reasonable threat of obstruction to the officers, and that the officers had

no justification to employ *any* force against him at the time he was shot, the claim is inconsistent with his conviction for resisting the officers and is barred under *Heck*. (*Thore v. Howe* (1st Cir. 2006) 466 F.3d 173, 180 [claim that the plaintiff had not committed an assault, and thus that the officer's use of force in response was excessive, was barred by plaintiff's assault conviction]; *Swiecicki v. Delgado* (6th Cir. 2006) 463 F.3d 489, 494-495; see generally *McCann v. Neilsen* (7th Cir. 2006) 466 F.3d 619, 621 ["a plaintiff's claim is *Heck*-barred despite its theoretical compatibility with his underlying conviction if specific factual allegations in the complaint are necessarily inconsistent with the validity of the conviction"].)

The record of the *Heck* hearing also demonstrates that Yount was attempting to drive while intoxicated. Hence, to the extent that Yount's section 1983 claim alleges that Officer Shrum "violated YOUNT'S rights to be free from arrest and detention absent probable cause," the claim is similarly inconsistent with his conviction for resisting the officers in the lawful performance of their duties and is barred under *Heck*. (*Nuno v. County of San Bernardino* (C.D.Cal. 1999) 58 F.Supp.2d 1127, 1134.)

However, to the extent Yount's section 1983 claim alleges simply that Officer Shrum's use of *deadly* force was an unjustified and excessive response to Yount's resistance, the claim is not

barred.[1] As defendants have conceded, the record at the *Heck* hearing did not support the use of deadly force against Yount, nor did the criminal conviction in itself establish a justification for the use of deadly force. (See *Tennessee v. Garner* (1985) 471 U.S. 1, 11-12; accord, *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333.) A claim alleging that Officer Shrum's use of deadly force was not a reasonable response to Yount's criminal acts of resistance does not "implicitly question the validity of [his] conviction" for resisting the officers in this instance (*Muhammad v. Close* (2004) 540 U.S. 749, 751) and thus is not barred by *Heck*. (*McCann v. Neilsen*, *supra*, 466 F.3d at pp. 622-623; *Gregory v. Oliver* (N.D.Ill. 2002) 226 F.Supp.2d 943, 952 ["in some instances a Section 1983 claim does not contradict the events that resulted in a plaintiff's convictions—two obvious examples would be an officer's unjustified imposition of excessive force in an overreaction to an arrestee's assault, or the imposition of excessive force after the event that led to a resisting-arrest conviction" (fn. omitted)]; accord, *Sanford v. Motts*, *supra*, 258 F.3d at p. 1120 ["if Motts used excessive force subsequent to the time Sanford interfered with his duty, success in her section 1983 claim will not invalidate her conviction"]; *Martinez v. City of Albuquerque* (10th Cir. 1999) 184 F.3d 1123, 1127 [plaintiff's criminal resistance "might justify the officers' use of reasonable force to effectuate [his] arrest, but would not authorize the officers to employ excessive or unreasonable force"].)

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[1] Because the officer in this case used deadly force, we need consider only whether Yount may proceed with his civil claims to the extent they challenge the officer's use of deadly force.

Defendants contend that the *Heck* bar should nonetheless apply because the shooting was part of a continuous transaction arising from Yount's resistance as well as "a consequence flowing directly from Yount's criminal conduct." But our analysis *does* take account of the fact that Yount's resistance caused the officers to respond with force of their own. As explained above, we find that Yount's section 1983 claim *is* barred to the extent it alleges that Officer Shrum lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. "For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." (*Jones v.Marcum* (S.D. Ohio 2002) 197 F.Supp.2d 991, 1005, fn. 9; accord, *Powell v.Scanlon* (D.Conn. 2005) 390 F.Supp.2d 172, 178 ["although inmate's conviction for resisting arrest was a factor in determining the acceptable level of force, 'it does not constitute a per se determination that any amount of force that plaintiff could prove is acceptable' "]; cf. *Susag v. City of Lake Forest, supra*, 94 Cal.App.4th at p. 1410 [applying the *Heck* bar where the plaintiff "alleged no claims of excessive force that took place after he was finally subdued and placed in the patrol car"].)

Defendants' broad invocation of the *Heck* bar to eliminate Yount's claims in their entirety would also severely diminish the protections available to those subject to arrest. "[I]t would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted—and be shielded from accountability under civil law—as long as the prosecutor could get the plaintiff convicted on a charge of resisting." (*VanGilder v. Baker*, *supra*, 435 F.3d at p. 692.) To the extent Yount does not deny that he resisted the officers (or that the officers had the right to respond with reasonable force), he poses no challenge to his conviction, and, to that extent, his section 1983 claim for damages arising from Officer Shrum's accidental use of deadly force is not barred by *Heck*. (*Gilbert v. Cook* (7th Cir. 2008) 512 F.3d 899, 901-902.)[2]

B

Yount relies heavily on *Smith v. City of Hemet*, *supra*, 394 F.3d 689, an en banc decision of the Ninth Circuit that discussed the effect of Smith's conviction for resisting an officer in violation of Penal Code section 148, subdivision (a)(1) on his section 1983 claim that the officers used excessive force when they employed pepper spray and a police canine to effect his arrest. (*Smith*, *supra*, at p. 694.)

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[2] Although we hold that this portion of Yount's section 1983 claim is not *Heck*-barred, we have not been asked to decide (and do not decide here) whether Yount may recover damages under section 1983 for Officer Shrum's *accidental* use of deadly force.

The summary judgment record there revealed that Smith had resisted the officers when they arrived at his house to investigate a domestic disturbance and continued to resist them while they attempted to place him under arrest. In response, the officers sprayed him in the face with pepper spray and directed the police canine to attack him. The dog bit Smith on his left and right shoulder, neck, and buttocks, and the officers sprayed him with pepper spray at least four additional times. (*Id.* at pp. 693-694.)

In reversing the trial court's determination that Smith's section 1983 claim was barred under *Heck*, the Ninth Circuit reasoned that "if Smith pled guilty to § 148(a)(1) based on his behavior *after* the officers came onto the porch, during the course of his arrest, his suit would be barred by *Heck*. [Citation.] In such a case, a successful § 1983 action by Smith would necessarily mean that the officers had used excessive force to subdue him and were therefore acting unlawfully at the time his arrest was effected. In that circumstance, Smith's conviction under § 148(a)(1) would have been wrongful and a successful § 1983 suit by him would demonstrate its invalidity. [Citation.] [¶] Under *Heck*, Smith would be allowed to bring a § 1983 action, however, if the use of excessive force occurred *subsequent to* the conduct on which his conviction was based. Specifically, Smith would be entitled to proceed below if his conviction was based on unlawful behavior that took place while he stood alone and untouched on his porch—that is, if his unlawful conduct occurred while the officers were attempting to investigate his wife's complaint. In such a case, a judgment in Smith's favor would not necessarily conflict with his

conviction because his acts of resistance, delay, or obstruction would have occurred while the officers were engaged in the lawful performance of their investigative duties, not while they were engaged in effecting an arrest by the use of excessive force." (*Smith v. City of Hemet*, *supra*, 394 F.3d at pp. 697-698.)

The possibility that this latter scenario *was* the basis for Smith's guilty plea is what led the Ninth Circuit to reverse the judgment in favor of the defendants—and it is worthwhile to revisit the Ninth Circuit's reasoning so as to demonstrate that Yount's reliance on the case is misplaced. The Ninth Circuit correctly observed that a defendant entering a plea of guilty or no contest in California "is free to admit having committed a specific act or acts of resistance, delay, or obstruction, to identify the particular acts of unlawfulness to which he is willing to plead, and to deny that he engaged in other . . . acts." (*Smith v. City of Hemet*, *supra*, 394 F.3d at p. 700, fn. 5.) In concluding that Smith's claim was not barred by *Heck*, the Ninth Circuit *assumed* that Smith had limited his plea to those acts that obstructed the officers' investigation (as opposed to the acts that obstructed the arrest) based merely on the fact that it was "possible" Smith had so limited his plea (*ibid.*) and on the parties' failure to offer a transcript of the plea hearing or otherwise to use "what transpired at the time Smith entered his plea" to rebut this possibility. (*Id.* at p. 698.) Because of this possibility, the Ninth Circuit concluded that Smith's lawsuit "does *not* necessarily imply the invalidity of his conviction and is therefore not barred by *Heck*." (*Id.* at p. 699.)

We need not consider here whether *Smith* was correctly decided because here, unlike in *Smith*, the trial court took judicial notice of the file of the criminal proceeding, including the transcript of the plea hearing. That transcript refutes any claim that Yount, at the time of his plea, admitted "having committed [only] a specific act or acts of resistance, delay, or obstruction"; that he identified "the particular acts of unlawfulness to which he [was] willing to plead"; or that he denied "that he engaged in other specific acts." (*Smith v. City of Hemet, supra*, 394 F.3d at p. 700, fn. 5.) Moreover, here, unlike in *Smith*, Yount's acts of resistance were part of one continuous transaction involving the officers' efforts to effect his arrest and cannot be segregated into an investigative phase and an independent arrest phase. (Cf. *id.* at p. 698.) We therefore conclude that *Smith* does not aid Yount here.

C

The parties do not separately address the effect of Yount's criminal conviction on his state law claim for battery. *Heck*, of course, is a rule of federal law that applies only to federal causes of action that challenge the validity of a state conviction. (*Nuno v. County of San Bernardino, supra* 58 F.Supp.2d at p. 1130, fn. 3.) But we cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct and, as stated above, the parties offer none. Section 1983 " 'creates a species of tort liability' " (*Heck, supra*, 512 U.S. at p. 483) and has been described as " 'the federal counterpart of state battery or wrongful death actions.' " (*Susag v. City of Lake Forest, supra*, 94 Cal.App.4th at p. 1413.) Indeed, Yount's common law battery cause of action, like his section 1983

claim, requires proof that Officer Shrum used unreasonable force. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1273-1274.)

Moreover, this court has recently reiterated its concern about the use of civil suits to collaterally attack criminal judgments in the context of a convicted criminal defendant's civil action against his or her attorney for legal malpractice. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1197.) In holding that a criminal defendant must obtain exoneration by postconviction relief as a prerequisite to obtaining relief for the legal malpractice that led to that conviction, we recognized that our ruling would preclude recovery "even when ordinary collateral estoppel principles otherwise are not controlling, for example because a conviction was based upon a plea of guilty that would not be conclusive in a subsequent civil action involving the same issues." (*Id.* at p. 1204.) Our justification for a bar of that scope included the promotion of judicial economy and the " ' "strong judicial policy" ' " recognized in *Heck* itself " ' "against the creation of two conflicting resolutions arising out of the same or identical transaction." ' " (*Coscia, supra*, 25 Cal.4th at p. 1204, quoting *Heck, supra*, 512 U.S. at p. 484.)

In light of the fact that *Heck* and California law express similar concerns about judicial economy and the avoidance of conflicting resolutions, we conclude that the analysis in the preceding sections applies equally to Yount's common law claim for battery. That is, to the extent Yount does not deny that he resisted the officers (or that the officers had the right to respond with reasonable force), he poses no challenge to his conviction, and, to that extent,

his cause of action for battery arising from Officer Shrum's use of deadly force is not barred.

DISPOSITION

We affirm in part and reverse in part the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion.

BAXTER, J.
WE CONCUR:
GEORGE, C.J.
KENNARD, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

CONCURRING OPINION BY WERDEGAR, J.

I concur in the judgment.

I agree with the majority that plaintiff Steven Yount may sue defendants under 42 United States Code section 1983 (section 1983) and for battery based on the claim that a police officer shot him while he was handcuffed and restrained. On this point the majority reasons: "[T]o the extent Yount's section 1983 claim alleges simply that Officer Shrum's use of *deadly* force was an unjustified and excessive response to Yount's resistance, the claim is not barred. As defendants have conceded, the record at the *Heck* hearing [see *Heck v. Humphrey* (1994) 512 U.S. 477] did not support the use of deadly force against Yount, nor did the criminal conviction in itself establish a justification

for the use of deadly force. [Citation.] A claim alleging that Officer Shrum's use of deadly force was not a reasonable response to Yount's criminal acts of resistance does not 'implicitly question the validity of [his] conviction' for resisting the officers in this instance [citation] and thus is not barred by *Heck*." (Maj. opn., *ante*, at p. 16 [fn. omitted]; see also *id.*, at p. 22 [applying the same reasoning to plaintiff's claim for battery].)

This reasoning suffices. The remainder of the majority's opinion is unnecessary to the decision and thus constitutes, in my view, obiter dictum of no precedential value. The majority attempts to justify its dictum by purporting to decide "that [plaintiff's] claims are barred to the extent they allege that Officer Shrum was not entitled to use force *at all* in this incident." (Maj. opn., *ante*, at p. 2.) But no such claim is before us. At the time of trial, plaintiff had elected to proceed on two theories only: section 1983 and battery. Both claims, as alleged in the first amended complaint, are based exclusively on the shooting. Plaintiff names only Officer Shrum as a defendant in his claim under section 1983, and he bases the claim on the allegation that Officer Shrum, "while acting under color of law with the Sacramento Police Department, shot and seriously and permanently injured" him. Plaintiff names both Officer Shrum and his employer, the City of Sacramento, as defendants in his claim for battery. But the only battery alleged is that plaintiff "was shot and seriously and permanently injured by defendant Officer Shrum . . . ."

I wish particularly to note that the case offers no proper occasion for the majority's elaborate effort

to distinguish and criticize the Ninth Circuit's decision in *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689 (en banc) (maj. opn., *ante*, at pp. 19-21) or for the majority's implicit suggestion that *Smith* may not have been "correctly decided" (maj. opn., *ante*, at p. 20). This dictum, if followed, could have the unfortunate effect of causing California state courts to apply *Heck*, *supra*, 512 U.S. 477, a decision of the United States Supreme Court on a point of federal law, differently than the federal courts of the Ninth Circuit, and thus may encourage forum shopping and create conflicts that only the high court can finally resolve.

WERDEGAR, J.

Filed 12/9/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

—

STEVEN YOUNT,	)	C046869
	)	(Super. Ct. No.
Plaintiff and Appellant,	)	01AS04272)
v.	)	
	)	ORDER
CITY OF SACRAMENTO et al.,	)	MODIFYING
	)	OPINION AND
Defendants and Respondents.	)	DENYING
	)	REHEARING
		[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed in this case on November 9, 2005, be modified as follows:

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV of the Discussion, which is not affected by this modification.

1. On page 5 of the opinion, in the third sentence of the final full paragraph, change the phrase "Officers Davis and Hatfield" to "the officers" so that the sentence reads:

> Finally, the officers forcibly extricated Yount from the back seat.

2. On pages 18 and 19 of the opinion, in footnote 4, delete the last sentence of the footnote, which reads: "But because there is no way of knowing which discrete acts of obstruction the jurors relied on in reaching a finding of guilt, we do not see the validity of the purported distinction." so that the footnote now reads in its entirety:

> *Smith II* also distinguished *Susag* on the ground that there the plaintiff's section 148 conviction was obtained through a jury verdict rather than a plea. The court reasoned that, unlike a guilty plea, the jury verdict necessarily determined the lawfulness of the officers' conduct throughout the entire course of events. (*Smith II, supra,* 394 F.3d at p. 699, fn. 5.)

3. On page 27 of the opinion, delete footnote 9, which begins: "The City's assertion at

oral argument" in its entirety and renumber the subsequent footnotes in the opinion accordingly.

This modification does not change the judgment.

The petition for rehearing filed by respondent City of Sacramento is denied.

BY THE COURT:

BLEASE, Acting P. J.

MORRISON, J.

BUTZ, J.

Filed 11/9/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

—

STEVEN YOUNT,	)	C046869
	)	(Super. Ct. No.
Plaintiff and Appellant,	)	01AS04272)
v.	)	
	)	
CITY OF SACRAMENTO et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a judgment of the Superior Court of Sacramento County, Richard K. Park, Judge. Reversed.

Brian T. Dunn for Plaintiff and Appellant.

Samuel L. Jackson, City Attorney, and Matthew D. Ruyak, Deputy City

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV of the Discussion.

Attorney, for Defendants and Respondents.

Plaintiff Steven Yount suffered personal injuries when Sacramento Police Officer Thomas Shrum shot him in the left buttock while four officers were trying to subdue and transport him to jail following his arrest for driving under the influence of alcohol (DUI). As Yount, who was handcuffed and in leg restraints, struggled and squirmed, Officer Shrum, intending to draw and fire his Taser gun, instead pulled out and discharged his nine-millimeter pistol.

As a result of the incident, Yount pleaded no contest to violating Penal Code section 148,[3] obstructing an officer in the performance of his duties. He then brought this suit against the City of Sacramento and Officer Shrum for damages under title 42 United States Code section 1983 (hereafter federal section 1983) alleging, inter alia, that Shrum violated his civil rights by using unnecessary and grossly excessive force on him during the encounter.

By stipulation of the parties, a court trial was held on the issue of whether Yount's civil rights claim was barred as a matter of law by his section 148 plea. After hearing witnesses and reviewing the criminal file pertaining to Yount's plea, the trial court ruled that under the doctrine announced by the United States Supreme Court in *Heck v. Humphrey* (1994) 512 U.S. 477 [129 L.Ed.2d 383]

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[3] Undesignated statutory references are to the Penal Code.

(*Heck*),[4] Yount's lawsuit was barred. Judgment was entered for defendants.

We shall conclude that on the record of the trial court, Yount's federal section 1983 cause of action did not necessarily imply the invalidity of his misdemeanor conviction for obstructing the officers in the course of their duties. Because the *Heck* defense does not preclude the maintenance of Yount's lawsuit, we shall reverse.

FACTUAL BACKGROUND

Alleging he was the victim of excessive force by Officer Shrum, Yount filed a multi-count complaint alleging civil rights violations under federal section 1983 as well as civil tort theories of relief. Defendants twice brought motions for summary judgment, each of which was denied.

By the time of trial, Yount had elected to proceed on two causes of action--his civil rights claim under federal section 1983 and common law battery. In pretrial proceedings, the trial court solicited briefing and argument from the parties on the issue of whether Yount's suit was foreclosed by his plea of no contest to violating section 148. After extensive trial briefs were submitted, the parties stipulated to bifurcate the proceedings and to conduct a bench trial on the applicability of the *Heck* defense.

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[4] We discuss the *Heck* doctrine in more detail in the Discussion, *post*. In a nutshell, however, the rule provides that any civil rights claim under federal section 1983 that impugns or collaterally attacks the claimant's prior criminal conviction may not be maintained unless that conviction has first been vacated. (*Heck, supra*, 512 U.S. at pp. 486-487 [129 L.Ed.2d at pp. 393-394].)

Summary of the Evidence

The court heard from several witnesses including the officers and a security guard who took Yount into custody. Yount did not testify, but excerpts from his deposition were read, which established that he had no memory of the occurrences that night. The testimony of percipient witnesses to the events leading up to the shooting is summarized below.

In the early morning hours of March 10, 2001, Daniel Powell, a private security guard, noticed a man near the 7-Eleven store on La Riviera Drive attempting to get in his car. The man, later identified as Yount, appeared to be under the influence of alcohol. Powell flagged down Sacramento Police Officer Samuel Davis, and pointed to a white vehicle in which Yount was attempting to drive off.

Officer Davis approached Yount and noticed that his eyes were glassy and he appeared to be inebriated. Davis asked Yount to step out of his vehicle. As Yount opened the door, he lost his balance and fell onto Davis. Yount smelled of alcohol, so Officer Davis directed him to get into the back seat of his police car. Yount walked over to Davis's car, but refused to get in the back seat. With Davis's assistance, Yount was finally placed in the back seat.

Once in the back seat, Yount's attitude changed. He began banging around in the car, screaming obscenities and directing racial slurs at Officer Davis, who is Black. Yount continued to resist for three to five minutes.

Finally, Officer Davis pulled Yount out of the patrol car, got him on the ground and, with the assistance of nearby security guards, managed to place him in handcuffs. As far as Davis was concerned, Yount was formally under arrest at this point.

Minutes later, Sacramento Police Officers Daniel Swafford and Thomas Shrum and California State University Police Officer Debra Hatfield arrived to provide backup assistance. As the officers were filling out paperwork for a DUI report, Yount again became hostile and violent in the back of the patrol car. He was kicking, screaming, yelling obscenities and banging his head against the passenger window. Officers Shrum, Swafford and Hatfield opened the door and tried to get Yount to calm down, but he was uncooperative, hostile and irrational. At one point Yount put his legs outside the patrol car, prompting Officer Swafford to apply his Taser gun, which calmed Yount temporarily and enabled the officers to get him back inside the car.

Soon, however, Yount resumed kicking, screaming and banging in the back of the patrol car. Just as Officer Davis walked toward the rear door of the car, Yount kicked the window out, causing glass to explode and shatter.

For safety reasons, the officers decided to transfer Yount to another patrol car. They tried to get him out of the car voluntarily, but he would not cooperate. Finally, Officers Davis and Hatfield forcibly extricated Yount from the back seat. As he fell out of the car, Yount landed on top of Officer Davis, injuring Davis's elbow. The officers then tried to pick Yount up and carry him to another patrol car.

The task was difficult, because Yount kicked, screamed and spat on the officers.

Officer Davis rolled Yount over on the ground and put his knee into Yount's back while the other officers held him down and applied leg restraints. Because Yount continued to resist and thrash about, Officer Shrum decided to apply his Taser. Shrum told the other officers to "hold on," that he was going "tase him." Shrum reached into his holster and drew what he thought was his Taser gun. Aiming toward the back of Yount's thigh, Shrum pulled the trigger and heard a pop. He looked at his hand and realized he had discharged his pistol. Shrum exclaimed "Oh god, I shot, I shot." Once they ascertained that Yount had suffered a gunshot wound, the attending officers summoned medical assistance.

The trial court took judicial notice of the entire criminal case file in *People v. Yount* (Super. Ct. Sacramento County, 2001, No. 01F02606), including the charging documents and the reporter's transcript of the hearing at which the plea was taken. That record disclosed that the People filed an amended complaint charging Yount, inter alia, with violating section 69, a felony, to wit: unlawfully attempting, by means of threats and violence, to interfere and prevent the officers from performing their duties. As a result of a plea bargain, Yount pleaded no contest to the reduced charge of violating section 148, which punishes as a misdemeanor one who "willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . ." (§ 148, subd. (a)(1) (hereafter § 148(a)(1).) Yount stipulated, and the trial court in the criminal

court found, that there was a factual basis for the plea.

DISCUSSION

I. Procedural Posture of the Case

Although the trial court did not expressly so state, the hearing it conducted can only be construed as a bench trial on the special defense raised by the *Heck* doctrine. (*Heck*, *supra*, 512 U.S. 477 [129 L.Ed.2d 383].) "It has long been held that special defenses that abate or bar the claim of the plaintiff may be tried before other issues, for a decision in the defendant's favor may render unnecessary the effort and expense of a complete trial." (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 164, p. 191.) This procedure is commonly used where defenses such as the statute of limitations and res judicata are interposed (*id.* at p. 192), but Code of Civil Procedure section 597 authorizes it for *any* defense not involving the merits, which, if valid, would bar the plaintiff's suit (7 Witkin, *supra*, § 164 at p. 192).

The record is clear that the trial court proceeding here did not constitute a trial on the merits, but rather an evidentiary hearing on a special defense, pursuant to Code of Civil Procedure section 597: The trial court solicited a waiver of Yount's right to jury trial *only* with respect to the *Heck* issue. It also repeatedly declared irrelevant evidence offered to prove that the force used by Officer Shrum was excessive, and several times emphasized that the question before it was not whether excessive force was used, but whether

Yount's claim was foreclosed by his plea in the criminal case.

We conclude the *Heck* issue was the only one adjudicated by the trial court. Indeed, given the limited nature of the stipulation, the court *could not* reach the underlying merits of Yount's tort claims without violating his right to a jury trial. (See *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 619-620; *Ceriale v. Superior Court* (1996) 48 Cal.App.4th 1629, 1635-1636.)

II. Standard of Review

The sole question before the trial court was whether Yount's federal section 1983 claim and related common law battery cause of action were foreclosed by the United States Supreme Court's holding in *Heck*. The trial court answered that question in the affirmative. There was no substantial conflict in the testimony of the witnesses to the incident. Resolution of the issue requires the application of legal principles to an undisputed set of facts, after trial of a special defense. This is a pure question of law, which we review de novo. (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 669-670.)[5]

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[5] Defendants misapprehend this principle in arguing that the trial court's descriptions or characterizations of Yount's arrest must be reviewed under the deferential substantial evidence test. The trial court's sole function here was to decide whether, on a set of undisputed facts, there was no liability as a matter of law. That is a legal question, not a factual one.

III. Analysis

A. *The Heck Rule*

In *Heck,* a man convicted of voluntary manslaughter brought a federal section 1983 suit against local officials who had investigated and prosecuted him, asserting they had engaged in unlawful acts that led to his arrest and conviction. (*Heck, supra,* 512 U.S. at pp. 478-479 [129 L.Ed.2d at p. 389].)

Because the plaintiff's federal section 1983 claim impugned the validity of his criminal conviction, the high court analogized the situation to the common law tort action of malicious prosecution, which requires termination of the prior criminal proceeding in favor of the accused. This requirement avoids collateral attacks on the conviction, and avoids conflicting resolutions in different courts arising from the same facts. (*Heck, supra,* 512 U.S. at pp. 484-486 [129 L.Ed.2d at pp. 392-393].) The Supreme Court continued: "[T]he hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to [federal section] 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." (*Id.* at p. 486 [129 L.Ed.2d at pp. 393-394].) Thus, in order to maintain a claim for damages under federal section 1983 for harm caused by actions, which, if they were unlawful, would render a conviction invalid, the plaintiff must prove the conviction has been vacated, reversed, expunged or impugned by a grant of a writ of habeas corpus. (*Id.* at p. 489 [129 L.Ed.2d at p. 396].)

A straightforward illustration of the rule can be seen in *Nuno v. County of San Bernardino* (C.D.Cal. 1999) 58 F.Supp.2d 1127 (*Nuno*). In that case, Nuno pleaded nolo contendere to obstructing a peace officer in violation of section 148 and carrying a concealed firearm. He later filed an action under federal section 1983, claiming he was detained unreasonably, falsely accused of committing a crime, assaulted and battered. (*Nuno*, at pp. 1129-1130.)

The court ruled Nuno could not maintain his action without showing the conviction had been vacated or expunged, explaining: "[P]laintiff's allegations that he was subjected to excessive force during his arrest, if proven, would necessarily imply the invalidity of his obstruction of a peace officer conviction. Under [section 148], a necessary element of a criminal prosecution for obstruction of a peace officer is that the obstruction must have occurred while the officer was engaged in the lawful performance of his or her duties. . . . [¶] An officer cannot be engaged in the lawful performance of her duties if she is subjecting an arrestee to excessive force . . . . [¶] The Supreme Court explained in footnote 6 of the *Heck* opinion that a successful federal section 1983 action, premised on a police officer's use of excessive force during an arrest, would necessarily imply the invalidity of the plaintiff's conviction for resisting that arrest in a state where the lawfulness of the resisted arrest was a prima facie element of the resisting-arrest offense." (*Nuno, supra*, 58 F.Supp.2d at p. 1133.)

No factual details of the arrest were recited in *Nuno*. Hence, there is no reason to doubt the district court's characterization of Nuno's federal section

1983 action as a collateral attack on his criminal conviction, impermissible under *Heck*.

B. *The Sanford Case*

In *Sanford v. Motts* (9th Cir. 2001) 258 F.3d 1117 (*Sanford*), the plaintiff Sanford was placed in handcuffs by one Officer Motts after she interfered with her boyfriend's arrest. She alleged that, while she was handcuffed, Motts punched her in the face when she made a rude comment to him. After pleading nolo contendere to a section 148 charge of interfering with an officer, Sanford filed a civil rights action based upon Motts's alleged use of excessive force. (*Id.* at pp. 1118-1119.)

The Ninth Circuit Court of Appeals held that Sanford's nolo plea was *not* barred because the plea did not conclusively resolve the question of whether Motts was acting lawfully at the time he allegedly used excessive force. The court stated: "Nothing in her testimony identifies the act of which [Sanford] was convicted as being a resistance to Motts'[s] punch. Nothing in the record identifies the punch as an arrest. Nothing in the record informs us what the factual basis was for Sanford's plea of nolo." (*Sanford, supra,* 258 F.3d at p. 1120.) The *Sanford* court concluded: "Excessive force used after an arrest is made does not destroy the lawfulness of the arrest. Sanford's conviction required that Motts be acting lawfully in the performance of his duties 'at the time the offense against him was committed.' [Citation.] Hence, if Motts used excessive force subsequent to the time Sanford interfered with his duty, success in her federal section 1983 claim will not invalidate her conviction. *Heck* is no bar. If Motts had shot and wounded her instead of

punching her while she stood handcuffed, there would be no doubt that she could sue him for violation of her civil rights. If she can prove the punch was delivered after she was arrested, she has an equally strong case." (*Ibid.*)

C. *Susag and Smith I*

In *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401 (*Susag*), the plaintiff Cory Susag (Cory) tried to prevent a deputy sheriff from removing, by tow truck, a car with an expired registration parked near his family's auto body shop. When the deputy ordered him out of the car, Cory cursed at him, started the car and accelerated the engine. After he ignored additional orders to get out of the car, the deputy pepper-sprayed him. Undeterred, Cory pushed the deputy and engaged in further defiance. Finally, additional officers arrived, overcame Cory's resistance and took him into custody. (*Id.* at p. 1406.)

After being convicted by a jury of a misdemeanor obstruction charge, Cory sued the sheriff's department and several deputies for civil rights violations, alleging that the officers beat and threatened him. The defendants obtained summary judgment based on the *Heck* doctrine. (*Susag, supra,* 94 Cal.App.4th at p. 1407.)

The *Susag* court affirmed. It held that Cory's allegations of excessive force, if proven, would necessarily imply the invalidity of his "resisting arrest" conviction, since an officer using excessive force cannot lawfully make an arrest. Hence, the lawsuit was precluded by *Heck*. (*Susag, supra,* 94 Cal.App.4th at pp. 1409, 1413.) Cory contended that because "the record in his criminal case, which

is not before us, does not reflect which acts formed the basis for his conviction, . . . he can pursue his [federal] section 1983 action for the officer's use of pepper spray before he was ultimately subdued and placed in the patrol car." (*Id.* at pp. 1409-1410.) The court disagreed, concluding "that any claim of excessive force based on discrete acts that occurred immediately preceding Cory's arrest is barred by the Supreme Court's holding in [*Heck*,] *supra*, 512 U.S. 477 [129 L.Ed.2d 383], since a finding in his favor would necessarily imply the invalidity of his conviction under . . . section 148, subdivision (a)." (*Id.* at p. 1410.) The court distinguished *Sanford* on the basis that the facts there indicated the officer punched the plaintiff *after* effectuating an arrest. (*Susaq*, at p. 1410.) Because his federal section 1983 claim was barred, *Susag* further held that Cory's battery claim was equally precluded. (*Susag*, at pp. 1412-1413.)

In *Smith v. City of Hemet* (9th Cir. 2004) 356 F.3d 1138 (*Smith I*) (judg. vacated and rehg. granted en banc (2004) 371 F.3d 1045), the Ninth Circuit dismissed a federal section 1983 claim in a situation with a fact pattern similar to *Susag*'s: A police officer responding to a domestic disturbance call encountered Smith, who several times refused to obey the officers' instructions. When Smith continued his defiance, the officers came onto his front porch, pepper sprayed him and sprung a police canine, which bit him several times. (*Smith I*, at pp. 1139-1140, 1143.)

Smith pleaded guilty to a misdemeanor section 148 charge and sued the officers under federal section 1983 for violating his civil rights. (*Smith I, supra*, 356 F.3d at p. 1140.) In a two-to-

one decision, the *Smith I* court held his claim was barred by the *Heck* rule. Following the logic of *Susag*, the court ruled that allowing Smith to proceed would imply that the officers were not acting lawfully in arresting him, a result incompatible with his conviction for resisting arrest. (*Smith I*, at pp. 1141-1143.) *Sanford* was again distinguished on the ground that the officer allegedly engaged in excessive force *after* the arrest had been accomplished. (*Smith I*, at p. 1143.)

D. *The Trial Court's Decision*

Yount's counsel, relying on *Sanford*, argued that his client engaged in a number of discrete acts prior to being shot by Officer Shrum that could have been found to have impeded the officers in the performance of their duties, and that since the criminal record was silent, it *was defendants'* burden to prove that the acts of resistance on which Yount's conviction was predicated were the same acts which formed the basis for his excessive force claim. Indeed, counsel argued, the acts of obstruction that Yount admitted by virtue of his plea *must have* preceded the shooting, because (1) the shooting constituted excessive force as a matter of law; (2) an officer using excessive force cannot be acting in the performance of his duties; and (3) the People could not have charged Yount with resisting an officer who was acting outside the course of his duties.

Relying heavily on *Susag* and *Smith I*, the trial court disagreed. He viewed the entire chain of acts as part of a contiguous course of resistance by Yount to the officers' attempt to arrest him. We quote, in part, from the trial court's comments: "[T]his case is extreme. Your client's efforts to resist

arrest were incredible, constant, relentless. There may have been some brief pauses, but nothing the officers did seem[ed] to work. [¶] You know, often, most of the time, I'm confident that an arrest is made technically and cleanly. And if thereafter excessive force is used, you got the *Sanford* doctrine that says, [y]ou get to go to court. [¶] . . . [¶] Arrests, as this case demonstrate[s], have to involve more than the technical, simple act of taking the suspect in custody. The police have to get control of the suspect in making an arrest, not simply make the technical arrest. [¶] . . . [¶] But *Smith* says and I'm quoting, 'For Smith to proceed in his excessive force claim, he must allege facts that would support a finding that the police used excessive force after his arrest was effected.' [(*Smith I*, *supra*, 356 F.3d at pp. 1142-1143.)] [¶] And as I'm saying, his arrest wasn't effected in this case until they were in a position to safely transport him in another squad car downtown."

Like the court in *Susag*, the trial court here ruled that Yount's nolo plea encompassed a general admission to *all* the acts of resistance leading up to his "arrest," which did not occur until the officers had him safely under control. Accordingly, Yount could not state a federal section 1983 claim based on Officer Shrum's use of excessive force without running afoul of *Heck*.

In their respondents' brief, defendants reprise many of the themes struck by the trial court. Citing *Susag*, defendants contend that because his resistance to the officers' attempts to subdue him was continuous and relentless, "[Yount] was ultimately arrested and subdued only when [he] was shot." Under this state of affairs, they argue,

Yount's criminal conviction for violating section 148 encompassed all the acts of resistance committed up until and including the "arrest."

E. *Smith II*

After the trial court entered judgment for defendants, the Ninth Circuit, sitting en banc, vacated *Smith I, supra*, 356 F.3d 1138 (by order at *Smith v. City of Hemet, supra*, 371 F.3d 1045) and issued a new decision superseding it, *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689 (*Smith II*) (cert. den. *sub nom. City of Hemet v. Smith* (2005) ___ U.S. ___ [162 L.Ed.2d 866]).

In *Smith II*, the en banc panel, by an eight-to-three vote, took a diametrically opposite view of the effect of Smith's section 148 plea than did the two-judge majority in *Smith I*, concluding that *Heck* was no bar to the civil rights action. (*Smith II, supra*, 394 F.3d at p. 693.)

In reaching its decision, the *Smith II* court first noted that Smith engaged in at least three or four acts of resistance, delay and obstruction *prior* to the time he was sprayed with pepper spray and bitten by the police dog. (*Smith II, supra*, 394 F.3d at pp. 696-697.) The court explained: "Our holding in *Sanford* was that a [federal section] 1983 action is not barred by *Heck* unless the alleged excessive force occurred *at the time* the offense under [section] 148(a)(1) was being committed. [Citation.] Thus, in this case, under *Sanford*, as long as the officers were acting lawfully *at the time* the violation of [section] 148(a)(1) took place, their alleged acts of excessive force, whether they occurred *before* or *after* Smith committed the acts to which he pled, would not invalidate his conviction." (*Smith II*, at p. 699.)

Because the criminal court record of Smith's plea to the section 148 charge was silent as to which acts of resistance or obstruction formed the basis for Smith's plea, and defendants did not demonstrate otherwise, pursuit of the federal section 1983 action did not *necessarily* invalidate his misdemeanor conviction and was therefore not barred by *Heck*. (*Smith II*, at p. 699.)

In a lengthy footnote, *Smith II* both distinguished *Susag* and disagreed with its reasoning. The court declared that *Susag* "misconstrues federal law in that it states, as the dissent emphasizes, that the burden shifted to the civil rights plaintiff to show that a favorable finding 'would not necessarily imply the invalidity of the conviction.' Federal law is to the contrary. See *Sanford*, [*supra,*] 258 F.3d at [p.] 1119 (placing the burden on the defendants to prove that plaintiff's success in her [federal section] 1983 action would necessarily imply the invalidity of her conviction). *Unless it is clear that the plaintiff's action will impugn the underlying conviction the [federal section] 1983 action may proceed.* It is because of this misapplication of federal law that *Susag* reached the result it did." (*Smith II*, *supra*, 394 F.3d at p. 699, fn. 5, italics added.)[6]

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[6] *Smith II* also distinguished *Susag* on the ground that there the plaintiff's section 148 conviction was obtained through a jury verdict rather than a plea. The court reasoned that, unlike a guilty plea, the jury verdict necessarily determined the lawfulness of the officers' conduct throughout the entire course of events. (*Smith II*, *supra*, 394 F.3d at p. 699, fn. 5.) But because there is no way of knowing which discrete acts of obstruction the jurors relied on in reaching a finding of guilt, we do not see the validity of the purported distinction.

F. *Resolution*

The fact patterns of *Sanford, Susag*, and the *Smith* cases are virtually indistinguishable from our case and from each other. In each case, the plaintiff committed more than one act which obstructed, impeded or delayed the officers in performing their duties. In all cases, the criminal record did not disclose which act formed the factual basis of the section 148 conviction. And in every case, the civil rights plaintiff alleged that excessive force was used at some point during his or her encounter with the officers.

Why the differing results? The controversy seems to revolve around what conclusions must be drawn from the civil rights plaintiff's criminal conviction. The courts in *Susag*, *Smith I*, and the trial court here, viewed the plaintiff's criminal conviction as encompassing all of the possible acts of officer resistance, or at least placed the burden on *the plaintiff* to show that the prior criminal conviction pertained to acts separate and distinct from those which involved the officer's alleged use of excessive force.

On the other hand, the courts in *Sanford* and *Smith II* construed a silent record in defendant's favor: As long as the evidence supported an inference that the alleged use of excessive force was temporally distinct from the acts that could have formed the basis for the plea, *Heck* did not apply, since the federal section 1983 claim did not *necessarily* impugn the outstanding criminal conviction. (See *Smith II*, *supra*, 394 F.3d at p. 699.)

To separate truth from legal fiction, it is first necessary to briefly revisit the *Heck* opinion. *Heck*,

of course, did not involve a plaintiff resisting arrest or claiming to be the victim of excessive force by peace officers. The plaintiff in *Heck*, having been convicted of manslaughter, sought to recover damages from the investigators and prosecutors for, essentially, framing him. (*Heck, supra*, 512 U.S. at pp. 478-479 [129 L.Ed.2d at p. 389].) It was an uncomplicated case of a civil plaintiff launching a collateral attack upon the validity of his criminal conviction, a result inconsistent with principles of res judicata and the finality of judgments. (*Id.* at pp. 484-485 [129 L.Ed.2d at p. 393].)

In a footnote to *Heck*, Justice Scalia, writing for the majority, gave the following illustration, which seems to have set the tone for the current debate: "An example of . . . a [federal section] 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful . . . would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, *defined as intentionally preventing a peace officer from effecting a lawful arrest.* (This is a common definition of that offense. See *People v. Peacock* [(1986)] 68 N.Y.2d 675, [676] [496 N.E.2d 683] [(*Peacock*)]; 4 C. Torcia, Wharton's Criminal Law [(14th ed. 1981)] § 593, p. 307.) He then brings a [federal section] 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this [federal section] 1983 action, he would have to negate an element of the offense of which he has been convicted." (*Heck, supra*, 512 U.S. at p. 486, fn. 6 [129 L.Ed.2d at

p. 394], "*lawful*" italicized in original, other italics added.)

What is important to observe about footnote 6 of *Heck* is the language we have italicized in the above quotation. Justice Scalia's example involves a case where the state criminal statute under which the plaintiff was convicted *defined* the crime as intentionally preventing a peace officer from *making a lawful arrest.* Indeed, the New York statute cited in *Peacock* contains that very definition (see *Peacock, supra,* 68 N.Y.2d 675 [496 N.E.2d 683], citing N.Y. Pen. Law, § 205.30 ["A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a . . . peace officer from effecting an authorized arrest . . . "]), as do the criminal codes of other states.[7]

The cases applying *Heck* to California plaintiffs who have suffered section 148 convictions have proceeded upon the unspoken assumption that the crime of which the federal section 1983 plaintiffs stood convicted was the same crime described in *Heck*'s footnote 6; i.e., "resisting arrest." (*Heck, supra,* 512 U.S. at p. 486, fn. 6 [129 L.Ed.2d at

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[7] See, e.g., Alabama Code section 13A-10-41, subdivision (a): "A person commits the crime of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from affecting a lawful arrest of himself or of another person"; Alaska Statutes section 11.56.700, subdivision (a): "A person commits the crime of resisting or interfering with arrest if, knowing that a peace officer is making an arrest, with the intent of preventing the officer from making the arrest, the person resists personal arrest or interferes with the arrest of another . . . "; and Revised Code of Washington section 9A.76.040, subdivision (1): "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him."

p. 394].) Thus, *Susag* recites that "the lawfulness *of an arrest* is an essential element of the offense of resisting or obstructing a peace officer." (*Susag, supra,* 94 Cal.App.4th at p. 1409, italics added.) *Sanford* permits the federal section 1983 suit to proceed based on the possibility that the use of excessive force took place *after* the "arrest." (*Sanford, supra,* 258 F.3d at pp. 1119-1120.) *Smith I* viewed the federal section 1983 suit as *Heck*-barred on the ground that proof of its allegations would imply that the "*arrest* was unlawful." (*Smith I, supra,* 356 F.3d at p. 1142, italics added.) Even *Smith II* bifurcates the officers' conduct into the "investigative" stage and "arrest" stage, allowing Smith's suit to proceed because the guilty plea may have encompassed acts which took place prior to the arrest. (*Smith II, supra,* 394 F.3d at pp. 697-699.) All of these cases are analytically flawed for one simple reason: In California, there is no crime of "resisting arrest."[8]

Section 148 bears the caption, "Resisting . . . or obstructing [a peace] officer . . . ,"[9] and, in subdivision (a)(1), provides that any person who "*willfully resists, delays, or obstructs any public officer* [*or*] *peace officer . . . in the discharge or*

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[8] Penal Code section 834a, enacted in 1957, states, "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest." However, as the California Supreme Court stated in *People v. Curtis* (1969) 70 Cal.2d 347, the statute "was meant at most to eliminate the common law defense of resistance to unlawful arrest, and not to make such resistance a new substantive crime." (*Id.* at pp. 354-355.)

[9] See heading for section 148, 47 West's Annotated Penal Code (2005 supp.) page 60.

attempt to discharge any duty of his or her office or employment" is guilty of a misdemeanor. (Italics added.) This definition has remained essentially unchanged for more than a century. (See Code commrs., Ann. Pen. Code, § 148 & note foll. (1st ed. 1872, Haymond & Burch, Commrs.-annotators) p. 67; Historical and Statutory Notes, 47 West's Ann. Pen. Code (1999 ed.) foll. § 148, p. 319.) Nowhere in section 148 is the term "arrest" found.

"'The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.'" (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) Clearly, these elements do not require an arrest or attempted arrest.

An "arrest" is defined in section 834 as "taking a person into custody, in a case and in the manner authorized by law." While other states have enacted statutes specifically criminalizing the act of resisting arrest (see fn. 6, *ante*), California's section 148 prohibits *any* act of willful interference with an officer's duties. Thus, despite its popular nickname, section 148 is *not* the crime of "resisting arrest" or its equivalent. The crime is more accurately described as "willful obstruction" and may be violated in multifarious ways *whenever* an officer is discharging a lawful duty (cf. *People v. Ritter* (1980) 115 Cal.App.3d Supp. 1, 5-6).

Because an arrest by a peace officer is not an element of a willful obstruction conviction under

section 148, it is not helpful, as other cases have done, to parse out, temporally segregate or characterize the nature of the "arrest" that the misdemeanant "resisted" for purposes of determining whether *Heck* applies.[10] The method for determining whether a civil rights claim is *Heck*-barred because of a prior section 148 conviction is far simpler than a reading of these cases would suggest.

First, the court must determine, using the substantial evidence test, what acts or omissions may have formed the factual basis for the plaintiff's obstruction conviction. Second, the court must ascertain what alleged misconduct by the officer forms the factual basis for the civil rights claim (e.g., excessive force). The final step is to consider the relationship between the plaintiff's acts of obstruction and the officer's alleged misconduct. If the civil rights violation could only have occurred while plaintiff was engaged in the same act of resistance or obstruction that formed the basis for his or her section 148 conviction, the federal section 1983 claim is barred by *Heck*. By contrast, if the evidence discloses at least one violation of section 148 independent of and discrete from the officer's alleged misconduct, *Heck* does not apply.

Thus, in the factual scenario of the *Smith* cases, if the *only* act of willful obstruction Smith committed during the encounter was to resist the efforts of the officers to subdue him on his front porch, his excessive force claim would be barred by his section 148 conviction. This is true because (1) a

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[10] Only the dissenting judge in *Smith I* recognized the mischief and confusion caused by inaccurately describing a section 148 violation as "resisting arrest." (*Smith I*, *supra*, 356 F.3d at p. 1150 (dis. opn. of Fletcher, J.).)

person cannot be convicted of willful obstruction unless the officer was acting in the lawful performance of his or her duties (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 982); (2) an officer using excessive force cannot be acting in lawful performance of his duties (*People v. Olguin* (1981) 119 Cal.App.3d 39, 44; *People v. White* (1980) 101 Cal.App.3d 161, 167); and (3) an obstruction conviction necessarily implies that the officer was discharging a lawful duty at the time. Therefore, in the above hypothetical, Smith's allegation of excessive force (pepper spray, dog bites, etc.) would be inconsistent with, and impugn the validity of, his section 148 conviction.

Of course, the actual facts were different. Smith disobeyed and resisted the officers a number of times before they came on to his porch to take him into custody. Indeed, both sides agreed that *any one* of these acts violated section 148(a)(1). (*Smith II*, *supra*, 394 F.3d at p. 697.) Since the criminal record did not rule out a conviction based on any of the other acts of delay or obstruction that took place prior to the resistance, which prompted the alleged use of excessive force, the Ninth Circuit properly concluded that Smith's federal section 1983 claim was not *Heck*-barred because its successful prosecution would not *necessarily* imply or demonstrate that the section 148 conviction was invalid. (*Smith II*, at p. 698.)

Likewise, the plaintiff in *Sanford* was properly allowed to pursue her federal section 1983 claim, not because she might have been already "under arrest" at the time the officer allegedly punched her, but because there was a factual basis for her willful obstruction plea based upon conduct

separate from and independent of the act of defiance which prompted the punch.

G. *Application to the Present Case*

Having settled on an appropriate test for determining whether, under *Heck*, a plaintiff's underlying section 148 conviction precludes his prospective civil rights claim, its application to Yount's case is not difficult.

Although it is true that Yount interfered with the performance of the officers' duties at the time he was shot by Officer Shrum, the record is clear that he committed several independently identifiable prior acts of resistance and obstruction during the encounter, including (1) kicking, screaming and banging in the back of Officer Davis's patrol car; (2) disobeying Davis's order to sit down; (3) resisting the attempt by the officers and security guards to handcuff him; (4) kicking the window out of the patrol car, causing glass to shatter on Officer Davis; and (5) forcibly resisting the attempts of the officers to transfer him to another patrol car, including spitting at Officer Davis.[11]

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[11] The City's assertion at oral argument that Yount pleaded to obstructing *four officers* in the performance of their duties is factually inaccurate. Yount was originally charged with obstructing four named officers by means of threats or violence (§ 69), a felony. The district attorney subsequently amended the complaint to allege felonious resistance against *two* named officers. The plea, as memorialized in open court, was to "interfering with *a peace officer*," a misdemeanor offense that the parties stipulated was "reasonably related" to the charged felony. (Italics added.) Thus, the criminal record provides no basis for an inference that Yount admitted to obstructing more than one officer.

As in *Smith II*, any one of these prior acts was sufficient to support a conviction for willful obstruction of a peace officer. Yount's conduct in squirming and struggling at the time he was shot was only the latest in a series of acts of disobedience and obstruction, *any one of which* could have formed the factual basis for his plea.

To quote *Heck*, the crucial question is whether the plaintiff's federal section 1983 suit would "*necessarily* imply the invalidity of [the] conviction or sentence." (*Heck*, *supra*, 512 U.S. at p. 487 [129 L.Ed.2d at p. 394], italics added.) If it would, the suit may not proceed. "But if the . . . court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." (*Ibid.*)

Had the only act that could have formed the basis for Yount's section 148 conviction been his resistance to the officers at the time he was shot, his claim would be barred by *Heck*. The uncontradicted evidence shows, however, that Yount violated the statute a number of times before Officer Shrum pulled out his firearm. The criminal court record recites only that Yount admitted there was a "factual basis" for his plea. That record is silent as to which act or acts formed the factual basis for Yount's admission. Thus, Yount's civil rights claim based on excessive force would not necessarily impugn his criminal plea, and *Heck* is no bar.[12]

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[12] As we have stated (pp. 13-14, *ante*), *Susag* held that if a plaintiff's federal section 1983 civil rights claim is *Heck*-barred, any common law battery claim based on the same set of facts is equally precluded. (*Susag*, *supra*, 94 Cal.App.4th at pp. 1412-

Truong v. Orange County Sheriff's Dept. (2005) 129 Cal.App.4th 1423, published since the close of briefing in this case, does not dictate a different result. There, the plaintiff Truong was booked on a shoplifting charge and ordered to disrobe and shower. According to her complaint, she initially balked, but after being surrounded by deputies, began to remove her sweater. As she did so, the deputies pounced on her and beat her up. (*Id.* at pp. 1425-1426.) Truong pleaded guilty to one count of violating section 148, subdivision (a), which was described on the plea form as "willfully and unlawfully resist[ing] and obstruct[ing] a peace officer's lawful order . . . to disrobe and take a shower." (*Id.* at p. 1426.) The trial court dismissed Truong's civil rights complaint based on *Heck*. In affirming, the Court of Appeal, Fourth Appellate District, Division Three, correctly observed that "[t]he central question is whether Truong's civil rights claim necessarily calls into question her conviction for violating . . . section 148." (*Truong*, at p. 1427.) The court concluded that it did, stating: "A chain of events began when Truong refused the lawful order that did not end until she was disrobed. This was not a case where the acts alleged to be violations of the plaintiff's civil rights occurred hours, or even minutes, after the act which led to the plaintiff's conviction; the acts occurred mere moments later. Asserting that the crime was somehow over because the plaintiff changed her mind and started to remove her sweater is temporal hairsplitting, and would place deputies in untenable situations, where they are required to guess the

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1413.) Nothing we say here should be construed as disagreement with that portion of *Susag's* holding.

mind-set of the arrestee. We agree with the trial court that Truong's refusal to obey the lawful order and the events that led to her injuries are part of an unbreakable chain of events. Therefore, the limit set forth in *Heck* applies here, and Truong's civil rights claim cannot be maintained." (*Truong*, at p. 1429.)

Although the *Truong* court's "chain of events" language is unfortunately redolent of the faulty analysis used in *Smith I* and *Susag*, its disposition was correct for a different reason: The plea form that Truong signed specified that her *refusal to obey a lawful order to disrobe* was the act which formed the factual basis for her conviction, the same act of resistance which the officers responded to by the use of force. Accordingly, Truong's criminal case record conclusively demonstrated that the alleged misconduct upon which her tort action was based occurred while she was engaged in the same act of resistance or obstruction that formed the basis for her section 148 conviction. Allowing Truong to maintain a civil rights suit would have impeached her section 148, subdivision (a) conviction, in direct violation of *Heck*.

The facts in our case are plainly distinguishable from *Truong*, because plaintiff delayed or obstructed the officers several times in many different ways over an extended period, yet the criminal record is silent as to which act or acts constituted the factual basis for the plea.

We conclude the trial court erred in giving judgment for defendants based on *Heck*. The special defense should have been disallowed and the case allowed to proceed.

IV. Other Issues

Both parties ask for relief extending above and beyond the ruling made by the trial court. Yount claims that since it is "undisputed" that Officer Shrum used "excessive and unreasonable force" by shooting him with a firearm, this court should reverse with directions to enter judgment for the plaintiff on both the federal section 1983 and common law battery claims. At the other end of the spectrum, defendants advance several arguments having nothing to do with the *Heck* defense, which are offered as alternative grounds for affirming the judgment.

All of these arguments fundamentally misapprehend the limited scope of what was decided by the trial court. As the trial court correctly recognized, the only issue before it was whether under *Heck*, Yount's excessive force claim was precluded by his prior section 148 plea. The underlying merits of Yount's lawsuit were not at issue. (See *Southern Pac. Co. v. Superior Court* (1924) 69 Cal.App. 106, 113 [merits of the case are not a proper subject of inquiry where trial held on the special defense of plea in abatement].)

Our only task here is to determine the correctness of the trial court's ruling on the *Heck* defense. None of the collateral issues that the parties here seek to raise were litigated or adjudicated below. Consequently, none of them is cognizable on this appeal.

The net effect of our reversal is to eliminate the *Heck* defense as an issue in the case. All other issues, whether of fact or of law, remained

unresolved and subject to further adjudication in the trial court.

DISPOSITION

The judgment is reversed. Plaintiff shall recover his costs on appeal. (Cal. Rules of Court, rule 27(a).) ***(CERTIFIED FOR PARTIAL PUBLICATION.)***

BUTZ, J.

We concur:

BLEASE, Acting P. J.

MORRISON, J.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

STEVEN YOUNT,	) **CASE NO.**
	) **01AS04272**
Plaintiff,	)
	) **JUDGMENT**
v.	) **AFTER**
	) **TRIAL**
CITY OF SACRAMENTO,	)
OFFICER THOMAS SHRUM,	)
and DOES 10,	)
Defendants.	)
	)

This action came on regularly for a bench trial on March 15, 2004, in Department 39 of the Superior Court, the Honorable Richard K. Park presiding; plaintiff Steven Yount was present and appeared by attorney Brian T. Dunn, and defendants City of Sacramento and Officer Thomas Shrum (present) appeared by Deputy City Attorney Matthew D. Ruyak.

The Court heard and considered the testimony, documentary evidence, and argument of counsel. The trial lasted less than one day.

The matter having been submitted for decision, and a statement of decision not having been requested, the facts as found by the court establish that defendants Officer Thomas Shrum and the City of Sacramento are entitled to judgment against plaintiff Steven Yount.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That judgment be entered in favor of defendants City of Sacramento and Officer Thomas Shrum and against plaintiff Steven Yount;

2. Plaintiff Steven Yount recover nothing from defendants City of Sacramento and Officer Thomas Shrum; and

3. Costs to be awarded to defendants pursuant to an appropriately filed and served cost memorandum.

Dated: 3/26/04

/s/ Richard K. Park
Hon. Richard K. Park
Judge of the Superior Court

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Penal Code

§ 148. Resisting, delaying or obstructing officer or emergency medical technician; interference with public safety radio communications; removal or taking of weapon; punishment

(a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding

one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.